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February 1, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *BellSouth Telecommunications, Inc.'s. Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245

Dear Ms. Dortch:

BellSouth Telecommunications, Inc. ("BellSouth") submits this response to a recent ex parte by the Competitive Carriers of the South, Inc. ("CompSouth"), which purports "to bring to the Commission's attention recent developments regarding the subject of BellSouth's petition"¹ These "recent developments," which are selective in nature, consist of the October 2005 order of the Tennessee Regulatory Authority ("Authority") memorializing the Authority's decision that is the subject of BellSouth's petition, a November 2005 decision by a Maine federal district court, and a recent order by the Georgia Public Service Commission.

The three decisions referenced in CompSouth's ex parte contravene federal law. They erroneously find that state public service commissions have authority to establish rates for elements provided under section 271 of the Telecommunications Act of 1996 ("1996 Act") that are not required to be unbundled under section 251, even though such an interpretation cannot be squared with the plain language of the 1996 Act or the Commission's *Triennial Review Order*.² These decisions also are inconsistent with the overwhelming majority of courts and commissions that have addressed this issue. By BellSouth's count, and as reflected in Appendix 1, there have been at least twenty-two federal court and state public service commission decisions finding that

¹ Ex Parte Letter from Henry Walker, Counsel for CompSouth, to Marlene Dortch, Secretary, FCC (Jan. 23, 2006) ("*CompSouth Ex Parte*").

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 664 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA IP*"), *cert. denied* 125 S. Ct. 313, 316 (2004).

state commissions have no authority to regulate non-section 251 elements. For example, the Indiana Utility Regulatory Commission recently issued an order rejecting the position espoused in CompSouth's ex parte, noting that it was joining "the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine requirements of Section 271."³ CompSouth notably fails to inform the Commission about such decisions, which plainly belie its argument that BellSouth's preemption petition "has no legal basis."⁴

Aside from the fact that the Maine, Georgia, and Tennessee decisions are contrary to the great weight of federal court authority and the decisions of most state commissions, they lack persuasive reasoning. For instance, although the Maine court asserted that state commissions can set rates for purposes of section 271, it cited no federal-law grant of such authority. Instead, the court concluded that *state-law* authority to set rates for purposes of section 271 is not "pre-empted" by section 271.⁵ The Tennessee Regulatory Authority made a similar mistake, claiming that "there is no language contained in the [1996 Act] that expressly prohibits state jurisdiction over Section 271 elements"⁶ But section 271 is a provision of *federal* law, and states have no presumed or inherent authority to implement federal law.⁷ As the Eighth Circuit has explained in language equally applicable here, "[t]he new regime [under the 1996 Act] for regulating competition is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state, law.*"⁸

The correct result is thus the one reached by other federal courts, including those in Mississippi and Kentucky. Those courts have explained that "[i]t is the prerogative of the FCC ... to address any alleged failure by [a Bell company] to satisfy any statutorily imposed conditions

³ Order, *In re: Indiana Utility Regulatory Commission's Investigations and Issues Related to the Implementation of the Federal Communications Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857 (Ind. URC Jan. 11, 2006). As the Texas Public Service Commission correctly held, the 1996 Act "provides no specific authorization for the [state public service commissions] to arbitrate Section 271 issues; Section 271 only gives states a consulting role in the 271 application/approval process." Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Texas P.U.C. Docket No. 28821 (Tex. PUC June 17, 2004). Or, as the Rhode Island Public Service Commission put it more colorfully, "... at the bistro serving up the [Bell Operating Companies'] wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'" Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18* (R.I. PSC July 28, 2005).

⁴ *CompSouth Ex Parte*, at 6.

⁵ *Verizon New England, Inc. v. Maine PUC*, No. 05-53-B-C, slip op. at 10 (D. Me. Nov. 30, 2005).

⁶ Final Order of Arbitration Award, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119 (TRA Oct. 20, 2005).

⁷ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

⁸ *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 1114, 1127 (8th Cir. 2000) (emphasis added).

to its continued provision of long distance service,”⁹ and thus that “[t]he enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.”¹⁰

Similarly, the Georgia Public Service Commission decision contravenes federal law by purporting to impose unbundling requirements under section 271, which it claims authorizes it both to require BellSouth to include access to non-section 251 network elements in section 251 interconnection agreements and to set “just and reasonable rates” for such access. Contrary to the Georgia Commission’s conclusion, it has no authority whatsoever to implement section 271, and its order does not even purport to cite any subsection of that provision granting such authority. On the contrary, the statute makes clear that only the Commission may enforce section 271 and that state commissions are limited to a purely advisory role.¹¹ The Georgia Public Service Commission’s decision is thus directly contrary to federal law.

Furthermore, the Georgia Commission’s order indicates its intention to conduct “an expedited hearing” to set “just and reasonable rates for de-listed UNEs pursuant to Section 271.” In determining whether it had the authority to do so, the Georgia Commission did not acknowledge, much less address, the fact that the only provision of federal law authorizing state commissions to set rates under the 1996 Act expressly limits such ratesetting authority to determining rates for “purposes” of section 251, not section 271.¹² Thus, even if the Georgia Commission had some authority under section 271 (which is not the case), Congress plainly withheld from state commissions ratesetting authority for purposes of that section.¹³

⁹ *BellSouth Telecomms., Inc. v. Mississippi Public Serv. Comm’n*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005),

¹⁰ *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 03:05-CV-16-JMH, slip op. at 12 (E.D. Ky. Apr. 22, 2005).

¹¹ See 47 U.S.C. § 271(d)(2)(B).

¹² See 47 U.S.C. § 252(d).

¹³ The Georgia Commission’s erroneous reading of section 271 is not the first time it has misinterpreted the 1996 Act. For example, a 2003 decision by the Georgia Commission establishing rates for unbundled network elements was overturned as being arbitrary and capricious and in violation of the 1996 Act. See Order, *BellSouth Telecomms., Inc. v. Georgia Pub. Serv. Comm’n*, No. 03-CV-3222-CC (N.D. Ga. Apr. 6, 2004), *aff’d* 400 F.3d 1268 (11th Cir. 2005). More recently, the Georgia Commission ordered BellSouth to continue allowing competing local exchange carriers (“CLECs”) to order the UNE-P in Georgia indefinitely for as long as CLECs could drag out proceedings to amend their existing interconnection agreements. A federal district court preliminarily enjoined that order, and that injunction was upheld by the Eleventh Circuit. *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, LLC*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. April 5, 2005), *aff’d* 425 F.3d 964 (11th Cir. 2005). Likewise, this Commission preempted a decision of the Georgia Commission (and other state commissions) requiring BellSouth to provide DSL service to an end user customer over the same unbundled loop leased by a CLEC, finding that such a requirement was inconsistent with the Commission’s unbundling rules and ran afoul of the appropriate state role in implementing unbundling policies under the 1996 Act. See Memorandum Opinion and Order and Notice of Inquiry, *In re: BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251 (FCC March 25, 2005). The Georgia Commission’s recent decision interpreting section 271 is only its latest that contravenes federal law, and BellSouth has filed a complaint in federal court seeking judicial relief. See *BellSouth Telecommunications, Inc. v. Georgia Public Service Comm’n*, Civil Action No. 1-06-CV-0162 (N.D. Ga. filed Jan. 24, 2006).

Although the Maine, Georgia, and Tennessee decisions represent the minority view, they are by no means the only orders that have erroneously interpreted a state commission's authority under section 271.¹⁴ Consequently, the Commission should promptly grant BellSouth's Petition, which would provide valuable guidance to state public service commissions conducting generic proceedings to implement the *Triennial Review Remand Order*¹⁵ and that are confronting requests from various CLECs for state commission-mandated rates for network elements that are not required to be unbundled under section 251 under the guise of section 271.¹⁶ Granting BellSouth's Petition also would put an end to unwarranted representations by CLECs that the Commission has tacitly endorsed the view that state public service commissions have the authority to set rates for elements not required to be unbundled under section 251.¹⁷

As the Commission repeatedly has found, "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable, and not unjust and unreasonably discriminatory."¹⁸ And, in the specific context of network elements that need not be unbundled, the Commission has concluded that the "market price should prevail," "as opposed to a regulated rate" of the type that these state commissions are considering.¹⁹ Simply put, in this context, meaningful competitive alternatives necessarily exist. As a result, parties seeking to negotiate a commercial agreement to govern access to such elements and services should be able to do so without the overhang of state public service commission involvement. Accordingly, the Commission should grant BellSouth's Petition and find that state commissions have no authority to establish rates for network elements not required to be unbundled under section 251.

¹⁴ See, e.g., Order, *Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447 (Mich. PSC Sept. 20, 2005) (noting that the Michigan Public Service Commission "is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252"); Arbitration Order, *Southwestern Bell Tel. 's Petition for Compulsory Arbitration of Unresolved Issues*, Case No. TO-2005-0336 (Mo. PSC July 11, 2005) (noting Missouri Public Service Commission's agreement that an interconnection agreement "must include prices for § 271 UNEs").

¹⁵ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), petitions for review pending, *Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued Feb. 24, 2006).

¹⁶ See Ex Parte Letter from Glenn Reynolds, Vice President – Regulatory, BellSouth, to Marlene Dortch, Secretary, FCC (June 10, 2005).

¹⁷ For instance, in proceedings before the U.S. District Court for the Eastern District of Missouri, a coalition of CLECs noted that BellSouth's Petition had been on the Commission's docket for 15 months and opined that "[n]othing the FCC has done on the BellSouth petition indicates the FCC is troubled by the TRA's assertion of authority to establish rates, terms and conditions for § 271 checklist items." Memorandum of the Coalition Defendants in Opposition to SBC Missouri's Opposition to Summary Judgment, *Southwestern Bell Tel. v. Missouri Pub. Serv. Comm'n*, Case No. 4:05-cv-01264-CAS, at 17 (E.D. Mo. filed Nov. 30, 2005).

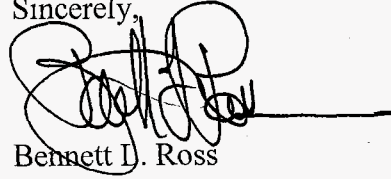
¹⁸ *Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 14 FCC Rcd 16252, ¶ 31 (1999).

¹⁹ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3906, ¶ 473 (1999).

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Please include a copy of this letter in the record in the above-referenced proceeding.
Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be "Bennett D. Ross", with a long horizontal line extending to the right.

Bennett D. Ross

BLR:dlr
Enclosure

cc: Dan Gonzalez
Michelle Carey
Ian Dilner
Jessica Rosenworcel
Scott Bergmann
Sam Feder
Tom Navin

#619718

APPENDIX 1

Decisions Finding No State Jurisdiction over Section 271 Elements

STATE	Date Ordered	271 Ruling on Commercial Agreements
Alabama	05/25/2005	“[T]he ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission.” <i>Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief</i> , Alabama Public Service Commission Docket No. 29393 (May 25, 2005).
Arkansas	10/31/2005	“[T]his Opinion will not attempt to resolve Section 271 issues because they are not subject to arbitration under Section 252 of the Act.” The Commission recognized that “ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 U.S.C. 251.” It explained that “[t]his Commission’s obligations under Section 271 of the Act are merely advisory to the FCC.” <i>Memorandum Opinion and Order</i> , October 31, 2005, <i>In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement</i> , Docket No. 05-081-U.
District of Columbia	12/15/2005	“[T]here is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252.” The Commission made clear that its authority does not extend to requiring “inclusion of section 271 network elements in interconnection agreements.” <i>Order</i> , December 15, 2005, <i>Petition of Verizon Washington, D.C. , Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996</i> , TAC 19, Order No. 13836, 2005 D.C. PUC LEXIS 257.
Idaho	07/18/2005	“[T]he Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement.” <i>Order</i> No. 29825; 2005 <i>Ida. PUC LEXIS</i> 139.
Illinois	11/2/2005	“The Commission rejects CLECs’ proposal to update underlying agreements requiring SBC to provide new rates, terms, and conditions for Section 271 elements, apart from any terms agreed to in the underlying agreement.” Illinois Commerce Commission Docket No. 05-0442, <i>Arbitration Decision</i> , November 2, 2005,

Indiana	01/11/2006	Joined “the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271.” Order, January 11, 2006, <i>In Re: Indiana Utility Regulatory Commission’s Investigation of Issues Related to the Implementation of the Federal Communications Commissions’ Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order</i> , Cause No. 42857.
Iowa	05/24/2005	Concluded it lacked “jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252.” <i>In re: Petition for Arbitration of Covad with Qwest</i> , Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), 2005 Iowa PUC LEXIS 186.
Kansas	07/18/2005	“The FCC has preemptive jurisdiction over 271 matters.” <i>Order No. 15: Commission Order on Phase II UNE Issues</i> , Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 (July 18, 2005).
Kentucky – U. S. District Court	04/22/2005	“While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.” <i>BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.</i> , Civil Action No. 3:05-CV-16-JMH, <i>Memorandum Opinion and Order</i> , (E.D. Ky. Apr. 22, 2004).
Maryland	04/08/2005	“With respect to whether Section 271 provides an independent basis for continued provisioning of switching . . . at TELRIC rates, the Commission notes that Verizon’s fulfillment of its Section 271 obligations do not necessitate the provision of Section 251 elements at Section 251 rates.” <i>In re: Petition of AT&T Comm. of Maryland, Inc. and TCG Maryland for an Order Preserving Local Exchange Market Stability</i> , Order No. 79893, Case No. 9026, 2005 Md. PSC LEXIS 11 (Apr. 8, 2005).

Massachusetts	07/14/2005	<p>“[O]ur authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.” <i>In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order</i>, D.T.E. 04-33, Arbitration Order (July 14, 2005).</p>
Minnesota	03/14/2005	<p>“There is no legal authority in the Act, the <i>TRO</i>, or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest’s objection . . . both the Act and the <i>TRO</i> make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271.” <i>Order Resolving Arbitration Issues</i>, Docket No. P-5692, 421/IC-04-549 (March 14, 2005) (<i>adopting December 16, 2004 Arbitrator’s Report</i>).</p>
Mississippi - U. S. District Court	04/13/2005	<p>“Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC. . . .” <i>BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com’n. et al.</i>, Civil Action No. 3:05CV173LN, <i>Memorandum Opinion and Order</i> (S.D. Miss. Apr. 13, 2005) 2005 U.S. Dist. LEXIS 8498.</p>
Montana – U.S. District Court	06/09/2006	<p>Section 252 did not authorize a state commission to approve an agreement containing elements or services that are not mandated by Section 251. <i>Qwest Corp. v. Schneider, et al.</i>, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).</p>
Ohio	11/09/2005	<p>“Although SBC’s obligations under Section 271 are not necessarily relieved based on the FCC’s § 251 unbundling analysis, these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements.” Arbitration Order, Case No. 05-0887-TP-UNC.</p>

Oregon	09/06/2005	<p>“Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common” <i>In re: Petition for Arbitration of Covad with Qwest</i>, Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), 2005 Ore. PUC LEXIS 445.</p>
Pennsylvania	06/10/2005	<p>“[T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations” <i>Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al</i>; R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005).</p>
Rhode Island	07/28/2005	<p>“At this time, it is apparent to the Commission that at the bistro serving up the BOCs’ wholesale obligations, the kitchen door numbered 271 is for ‘federal employees only.’” Docket No. 3662, <i>In re: Verizon-Rhode Island’s Filing of February 18, 2005 to Amend Tariff No. 18</i> (July 28, 2005).</p>
South Dakota	07/26/2005	<p>The Commission “does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 In addition, . . . section 252(c)(1) requires the Commission to ensure that [its] resolution of open issues ‘meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title’ The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.” <i>In re: Petition for Arbitration of Covad with Qwest</i>, South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), 2005 S.D. PUC LEXIS 137.</p>

Texas	06/17/2005	“decline[d] to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; Section 271 only gives states a consulting role in the 271 application/approval process.” Arbitration Order, <i>Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i> , Texas P.U.C. Docket No. 28821 (June 17, 2004).
Utah	02/08/2005	“Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.” <i>In re: Petition for Arbitration of Covad with Qwest</i> , Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), 2005 Utah PUC LEXIS 16.
Washington	02/09/2005	Holding that, because “[t]he FCC has the exclusive authority to act under Section 271,” state commissions “ha[ve] no authority under Section 252 or Section 271 of the Act to require inclusion of Section 271 unbundling obligations in the parties’ interconnection agreements,” and “[a]n order requiring [such] inclusion . . . would conflict with the federal regulatory scheme.” <i>Washington Covad/Qwest Decision</i> , 2005 Wash. UTC LEXIS *38